IN THE

Supreme Court of the United States

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners,

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,

Respondents.

MEMORANDUM *AMICUS* IN RESPONSE TO REQUEST OF COURT FOR ADVICE ON EFFECT, IF ANY, THE ENACTMENT OF THE CIVIL RIGHTS ACT OF 1968 HAS UPON THIS LITIGATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Statement of the *Amici*

The *amici* in whose behalf this memorandum is submitted have filed a brief on the substantive issues in this case. In that brief they set forth the grounds for their interest in the issues raised in this case and their strong belief in the current validity and constitutionality under the Thirteenth Amendment of Section 1982 of Title 42 of the United States Code. They are, of course, pleased to note that the Congress has taken action in 1968 to provide

new sanctions under federal law against some aspects of housing discrimination based on race, color, religion or national origin. But they believe that this action does not replace or in any way minimize the legal impact and enforcibility of Section 1982 of Title 42. They are, therefore, presenting to the Court as *amici* their views on the question raised by the Court in its order of April 22, 1968.

Statement of the Question

The complaint in this case charges that the defendants' concerted willful refusal to sell a house and lot to plaintiffs, husband and wife, solely because of the husband's race (he is a Negro) violated their rights, privileges and immunities under the Civil Rights Act of 1866 (42 U.S.C. Sec. 1982) which guarantees all citizens a right to purchase real property equal to that enjoyed by white citizens. The complaint also charged violation of other post-Civil War civil rights acts and of the Thirteenth and Fourteenth Amendments.

The complaint alleges a refusal by defendants because of plaintiff husband's race to sell a lot selected by plaintiffs after inspection of the lots offered for sale in the defendants' subdivision involved in the action, Paddock-Woods. There was a concomitant refusal to build a type of house selected by plaintiffs from display homes on the site. The complaint concludes with a prayer for an injunction preventing the defendants from failing to reserve Lot No. 7147, the lot selected by plaintiffs and from refusing to build on the said lot a "Hyde Park" model three-bedroom home, a type of home defendants were offering to build, the home type selected by plaintiffs. The complaint also seeks

actual damages of $50 plus punitive damages of $10,000 for defendants' deprivation of plaintiffs' rights.

Shortly after oral argument of this case, the Congress of the United States passed and the President signed Public Law 90-284, Title VIII of which deals with fair housing. Section 801 thereof proclaims the policy of the United States to provide, "within constitutional limitations," for fair housing throughout the United States. Section 802 provides that the ban on certain forms of housing discrimination is to go into effect in three stages. The first stage occurs on the signing of the bill into law (April 11, 1968) and bars discrimination in federally owned or operated housing and federally assisted housing. (The subdivision of Paddock Woods received no form of federal assistance sufficient to subject it to the bans of this provision). The second stage occurs on January 1, 1969 and subjects all housing other than any single-family house sold or rented by an owner who does not own more than three single-family houses at any one time and rooms or units in dwellings containing living quarters for no more than four families, if the owner occupies one of such living quarters as his residence, to the ban against discrimination based on race, color, religion, or national origin. Hence if Paddock Woods is not fully sold out by January 1, 1969, and the defendants own three or more houses therein, the Act would be applicable to them. The third stage occurs on January 1, 1970, when sales or rentals of single-family homes are covered unless such sale or rental is made without the use of any real estate broker or salesman or of any person in the business of selling or renting dwellings and without the use of any advertisement or notice involving discretionary

specifications based on race, color, religion or national origin.

The provisions of the Act are enforcible by various means. The Secretary of Housing and Urban Development may investigate complaints of violation by persons claiming to have been injured by a discriminatory housing practice. He may seek to adjust such complaints by conference, conciliation and persuasion. The person aggrieved may, after a thirty day waiting period, bring action in the federal courts which may, in certain circumstances, enjoin the respondents from engaging in the discriminatory practice objected to or order such affirmative relief as may be appropriate, subject to the condition that any sale or rental consummated prior to the issuance of any court order issued under the Act involving a bona fide purchaser or tenant without actual notice of the existence of the complaint or civil action under the Act shall not be affected.

The question to which this Memorandum *amicus* is directed is the effect, if any, that the Act described in relevant part above, has upon the issues in this case.

Summary of the Argument

The enactment of Title VIII of the Civil Rights Act of 1968 has no effect on the litigation in *Jones* v. *Alfred H. Mayer Company* because Title VIII is not only not retroactive; it is purely prospective except for federally aided housing, not here involved, which it covers from the date of its enactment. Nothing in the 1968 Act would be effective to provide plaintiffs and others in the same situation

as plaintiffs with any remedy for the violations of their civil rights they have previously suffered.

Even though it is clear that Title VIII does not cover the racially discriminatory acts to which petitioners have been subjected and of which they complain in this case, it might be argued that the adoption of Title VIII reflected a congressional view that the 1866 Act either did not apply to the sales and rentals covered by Title VIII or an intent of Congress to limit the coverage of the 1866 Act to housing covered by Title VIII. But it is noteworthy that even though mention was made of the pendency of this case in the Senate Committee hearings on Title VIII, there is no express reference to the 1866 Act in the current act nor is there any indication in the statute or the debates of any congressional intent to repeal it. Further such a repeal by implication is not favored: An intent to repeal must be clear and manifest. Section 109 of Title I of the United States Code reinforces this view.

The objective of the Civil Rights Act of 1968, including Title VIII thereof, is different from that of the Civil Rights Act of 1866. The latter act, including the portion of it preserved in Sec. 1982 of Title 42 of the U. S. Code, was adopted to implement the abolition of human slavery and involuntary servitude pronounced by the Thirteenth Amendment. Its purpose was to eliminate the badges and vestiges of Negro slavery. It was included to guarantee the fundamental rights seen as essential for human freedom and decency and necessary to secure the basic rights of United States citizens including the same rights to purchase and lease real property as were exercised by white citizens.

Title VIII of the 1968 Act, on the other hand, was enacted to deal with the problems arising out of the existence in many American cities and towns of racial ghettos which developed because of patterns of racial discrimination in housing and economic discrimination and disabilities to which many American of Negro origin are now being subjected. Whereas the 1866 Civil Rights Act was concerned essentially with protecting basic individual rights essential to citizenship, the 1968 Act is concerned with insuring proper relations between groups.

A principal issue in this case is whether Congress, in enacting the 1866 Civil Rights Act, had the constitutional authority to make it applicable to racial discrimination by private individuals in the sale or lease of real property. Petitioners, respondents and the *amici* sponsoring this memo all expressed the view that Section 2 of the Thirteenth Amendment conferred such authority. The same question arises whenever a statute seeking to secure civil rights imposes obligations on individuals acting in their private capacity without any definite determination that the individual action involves "to some significant extent" any manifestations of state action (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961)). Title VIII of the 1968 Civil Rights Act might well raise the same problem. There are provisions of it which seem to be applicable to actions by individuals, not involving the state to some significant extent. Hence a decision on this aspect of the case may well help anticipate and resolve some of the issues of constitutionality which might arise with respect to Title VIII.

I

The enactment of Title VIII of the Civil Rights Act of 1968 has no effect on the litigation in this case.

Title VIII of the Civil Rights Act of 1968 is purely prospective in impact and can have no retroactive effect. It can become applicable to housing of the type involved in this case only on January 1, 1969 since that housing, as was conceded by the parties in the argument of this case before this Court, involves p[illegible]form of federal aid and is not, therefore, subject to the limitations of Title VIII when that provision wei[illegible] into effect on the President's signing it on April 11.

Furthermore, the petitioners herein seek both an injunction against respondents' failing to reserve the lot they had selected as the one they wished to buy, Lot No. 7147, in Paddock Woods, a lot offered for sale by respondents, and against respondents' refusing to erect thereon the home petitioners had indicated they wished respondents to build on the lot, a type of home offered for sale by respondents. Petitioners also seek damages for the denial by respondents of their civil rights guaranteed by the 1866 Civil Rights Act and the other acts cited in the complaint and by the Thirteenth and Fourteenth Amendments.

While there is provision for assessment of actual damages and punitive damages of not more than $1,000 in civil suits brought by private persons to enforce rights granted by Title VIII of the Civil Rights Act of 1968 (see Sec. 812(c)), this would require petitioners to initiate a new suit under that act. And the damages they seek in the instant

case of $50 actual damages and $10,000 punitive damages would clearly be inapplicable under the law since such damages would have to be measured from the date of creation of the rights established by the 1968 Act. The violation occurring in 1965 of their rights under the 1866 Act would go unrecompensed. And while there is provision for issuance of an injunction in Section 810(d) and Section 812(c) this right applies only to housing subject to the bans of the Act and the housing here in question is not now subject to those bans and there is no certainty that it will become subject to those bans in the future. Nothing in the record indicates that the entire Paddock Woods project may not have been completely sold to individual buyers by the respondents by January 1, 1969 in which case the Act would not apply to the project even on January 1, 1969. Neither is there anything in the record of this case to permit the inference that respondents may not have sold the lot in issue to a purchaser without notice of the petitioners' claim, thus preventing the effective imposition of the injunction sought. (See Sec. 812(a)). The provision for imposition of compensatory damages (Sec. 812(c)) limits punitive damages to $1,000 whereas petitioners here seek $10,000 in damages. And even such damages would be assessable only if petitioners, after January 1, 1969, renew their effort to purchase a lot and home in Paddock Woods, find such lots and houses are still for sale, and are rejected again because of race. In this connection, it must be noted that respondents, having been forewarned, may be less willing to spell out their reason for rejecting petitioners' application to purchase and thus increase the burden, if not make it impossible for petitioners to prove that this latest rejection made after January 1, 1969, stemmed from racial

discrimination. Hence, if petitioners cannot obtain relief in the instant suit for the injury done them in February 1965 in violation of their civil rights established under the Civil Rights Act of 1866 and the Thirteenth Amendment, they may well be left without any effective remedy since the Civil Rights Act of 1968 has no provisions which insure them a remedy for that wrong. It would be truly ironic if the enactment of a new law aimed at remedying the evils of racial segregation in housing were to become the device by which petitioners, who are complaining of racial discrimination in the denial of their civil right to purchase real property on the same basis as white citizens, are denied a remedy for violation of that right.

II

The enactment of the Fair Housing provisions of the Civil Rights Act of 1968 can in no way be interpreted as repealing or limiting the coverage or applicability of the ban against discrimination on the basis of race in Section 1982 of Title 42 of the United States Code (derived from the Civil Rights Act of 1866) in the sale or lease of real property.

As has been stressed in the briefs of the petitioners herein and of several of the *amici*, including those subscribing to this memorandum, Section 1982 of Title 42 of the U. S. Code applies to all sales of real property, unlike the provisions of Title VIII of the Civil Rights Act of 1968. And unlike the latter act which applies to discrimination based on religion and national origin as well as on race or color, Section 1982 operates on its face to bar only discrimination based on color or race. These differences may

well serve as the basis for an argument by respondents that when Congress adopted the 1968 Act it thereby either limited or even repealed the long-standing provision of the 1866 Civil Rights Act embodied in Section 1982.

This view, it is submitted, is without basis in fact or in law. The provisions of Section 1982 clearly prohibit racial discrimination in all sales and leases of real estate. The provisions of the Fair Housing title of the 1968 Act prohibit racial discrimination only in some housing. It is submitted that the latter act, insofar as it prohibits racial discrimination in housing, is merely cumulative, repeating some of the prohibitions of the 1866 Act, and serves, in this respect, to add additional administrative enforcement devices to establish specific authority for enforcement by action in federal courts, to provide for cooperation in enforcement with state and local anti-discrimination agencies and to add, in the case of the types of housing covered, a ban against discrimination based on religion and national origin.

It is clear that the 1968 Act contains no express repeal of the existing law against racial discrimination in housing. Nor can repeal by implication be inferred. Repeal by implication is not favored in our legal system. *Rosenberg* v. *U. S.*, 346 U. S. 273, 294 (1953); *U. S.* v. *Borden*, 308 U. S. 188, 198 (1939).

Looking to legislative intent to determine whether the later enactment of a statute dealing with the same general subject as an earlier statute was intended as a repeal by implication, we find that this Court has said that such an intent to repeal the earlier statute must be "clear and

manifest''. And such an intent is established usually if there is an irreconcilable conflict between the old law and the new law. *Posada* v. *Nat'l City Bank*, 296 U. S. 497, 503 (1936). There is no inconsistency between the two laws here under examination.

It is noteworthy that even though mention was made of the pendency of the instant case and its 1866 Civil Rights Act and Thirteenth Amendment aspect in the hearings before a Senate Subcommittee considering the bill which ultimately became Title VIII of the 1968 Act (see Hearings, Subcommittee on Housing and Urban Affairs, S.1358, S.2114 and S.2280, Aug. 21, 22, 23, 1968, p. 229), there is no express reference to the 1866 Act in the 1968 Act, nor is there any indication in the 1968 Act itself or in the debates on the floor of Congress of any intent to repeal or limit the 1866 Act. Rather, in the hearing on the proposal, interest was expressed in the possibility of the 1866 Act being an alternative device for dealing with the problem of racial segregation in housing, which, if upheld by this Court, might help solve that problem.

The reluctance of Congress to extinguish existing rights even when it does specifically repeal a statute, something it did not do in the case of the 1866 Civil Rights Act, is reinforced by Section 109 of Title 1 of the U. S. Code which provides that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

III

Section 1982 of Title 42 of the United States Code derived from the Civil Rights Act of 1866 and Title VIII of the Civil Rights Act of 1968 are substantially different in objective and in the means each establishes to achieve that objective and are in no way in conflict or inconsistent.

Section 1982 of Title 42 of the United States Code derives from the Civil Rights Act of 1866 enacted under the authority of Section 2 of the Thirteenth Amendment was adopted to implement the abolition of Negro slavery pronounced by that Amendment. The Civil Rights Act of 1866 declared the freed slaves to be citizens of the United States and undertook to secure for them the fundamental rights considered to be the minimum essentials of such citizenship. One such right was to inherit, purchase, lease, sell, hold and convey real property, a right generally denied to slaves under state law at the time of the adoption of the Thirteenth Amendment. This was one of the badges or incidents of slavery which the authors and enactors of the Civil Rights Act of 1866 recognized as a disability which must be eliminated if the freed slaves were to become truly free men and citizens of the United States. This right, like the other rights established by that Act, was viewed by Congress as one which must be guaranteed by federal power to every individual if that individual was to live as a free citizen. That is made clear by the very language of the statute which talks of the right of "all citizens of the United States." At that time there was no general pattern of racial segregation in housing in the United

States. But there were patterns of law and practice which barred Negroes from purchasing real property, from suing and testifying as witnesses. The problem then was not, as the brief *amicus* of the Department of Justice suggests, one of fencing the freed slaves out of the community, but rather one of guaranteeing to them the exercise of rights as individuals necessary to allow them to live in the community as free men. One important right was that protected by the portion of the Civil Rights Act of 1866 now embodied in Section 1982 of Title 42. When this law was adopted the concepts of fencing people out of the community on the basis of race and of dealing with racial segregation in housing by fair housing legislation were not known. Neither was there any claim that racial discrimination in the sale of housing could be dealt with by offering those discriminated against a "comparable" house at a "comparable" price. Rather the concept of the uniqueness of every piece of real property was even more deeply imbedded in our common law then than it is now.

In essence, the Civil Rights Act of 1866 sought to deal with the problem as one involving protection of the rights of individuals, not one involving intergroup relations. The issue was not one of relations between groups, nor of fear of riot or violence. The 1866 Act was intended to assist the freed slaves in their individual progress toward full participation as citizens and free men in our American society.

Title VIII of the Civil Rights Act of 1968, on the other hand, arose out of the recognition of the need to deal with the problems of the racial ghettos which had grown up in

almost every one of our major cities, a problem intensified by the growth around most of those cities of a ring of white suburbs which intensified the pattern of racial segregation made manifest by the racial ghetto. The Harlems and Wattses are only in part the result of a persistent pattern of denial to Negroes of their right to equality of housing opportunity. They are also the result of the poverty and other economic and cultural deprivations by which most Negroes in our country are oppressed to a substantial extent. The racial tension resulting, as the Kerner Commission has reported, both from the confinement of the Negro to the racial ghetto and the patterns of white racism which tend to perpetuate these evils, is what led Congress to adopt the Civil Rights Act of 1968, the fair housing provisions of which seek to deal with those tensions and to lay the basis for improving relationships between the racial groups comprising our population. The 1866 Act declared individual rights. The 1968 Act sought to eliminate the sources of racial violence and group unrest. Each can work in its sphere, and neither limits the other. Of course, the remedies established under the 1968 Act might be of use in assuring observance of the individual rights established under the 1866 Act. There is no conflict or contradiction between them. They can serve as complementary means to implement the guarantees of both the Thirteenth and Fourteenth Amendments.

IV

A ruling that Section 1982 of Title 42 is constitutional under the Thirteenth Amendment and applies to all sales of real property by private individuals would establish a strong precedent for the constitutional validity of the Fair Housing provisions of the Civil Rights Act of 1968 and thus minimize the danger of disregard of the provisions of that Act.

A principal issue in the instant case, the principal issue in the view of the *amici* subscribing to this brief, is the constitutional authority of Congress under the Thirteenth Amendment to enact legislation directed against discrimination based on race or color by private individuals selling individually owned real property with no involvement whatsoever of "state action". Petitioners and respondents and the *amici* submitting this memorandum all expressed the view that Section 2 of the Thirteenth Amendment conferred such authority on Congress. Yet this Court has never ruled on this specific issue. Since the same question arises whenever Congress adopts a civil rights provision imposing obligations not to discriminate on the basis of race or color or religion or national origin on individuals acting in their private capacity without any indication that such action involves "to some significant extent" any manifestations of state action (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961), a decision in this case on this issue might well obviate many of the legal tests of constitutionality by litigations which would normally be expected to develop with respect to the Civil Rights Act of 1968 and especially Title VIII thereof. Cer-

tainly, if the Court, in this case, should rule that Congress has the authority under Section 2 of the Thirteenth Amendment, to enact Section 1982 of Title 42 of the U. S. Code barring racial discrimination in all sales of real property, it would follow, *a fortiori,* that Congress has the power to enact legislation which, in a more limited fashion, bars aspects of such discrimination as well as discrimination based on religion and national origin and has authority also to establish additional administrative machinery to enforce such a ban, as well as judicial machinery for the same purpose.

This is not to say that there may not be other more or less effective constitutional grounds for upholding the fair housing provisions of the Civil Rights Act of 1968. Some of these grounds are spelled out in Point II of the brief *amicus* submitted by the *amici* subscribing to this Memorandum and in footnote 119 appearing at pp. 83 and 84 thereof. But a ruling with respect to the impact of the Thirteenth Amendment on the federal power to bar racial discrimination in the fundamental field of access to possession of real property would, it is submitted, help resolve this important issue and enable the federal power to be invoked most effectively in dealing with major aspects of our current urban crisis.

Conclusion

The enactment of the Civil Rights Act of 1968 in no way serves to weaken or lessen the urgency and importance of this Court's resolving the issues raised in this case.

Respectfully submitted,

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